STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

DONALD OWENS, PJ

Supreme Court No.: 124786 and 124787

LOUIS GHAFFARI,

Plaintiff-Appellant,

v.

TURNER CONSTRUCTION COMPANY,
a Michigan corporation,
HOYT, BRUM & LINK,
a Michigan corporation, and
GUIDELINE MECHANICAL, INC.,
a Michigan corporation,
Jointly and Severally,

Defendants-Appellees.

DEFENDANT-APPELLEE, TURNER CONSTRUCTION COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS INVOLVED

I. SHOULD THE OPEN AND OBVIOUS DOCTRINE HAVE ANY APPLICATION IN A CLAIM UNDER THE COMMON WORK AREA DOCTRINE DESCRIBED IN *ORMSBY v CAPITAL WELDING, INC.*, 471 MICH 45; 684 NW2d 320 (2004)?

II. CAN THE OPEN AND OBVIOUS DOCTRINE BE RECONCILED WITH *HARDY v MONSANTO ENVIRO-CHEM SYSTEMS, INC.*, 414 MICH 29; 323 NW2d 270 (1992), AND WHETHER SAFETY IN THE WORKPLACE CAN STILL BE ENHANCED BY THE APPLICATION OF PRINCIPLES OF COMPARATIVE NEGLIGENCE?

III. ARE PLAINTIFF'S CLAIMS AGAINST HOYT, BRUM AND LINK AND GUIDELINE MECHANICAL BARRED BY THE OPEN AND OBVIOUS DOCTRINE?

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V. WAS THE AREA WHERE THIS ACCIDENT OCCURRED A COMMON WORK AREA; DID THE PIPES STORED ON THE FLOOR CONSTITUTE A SAFETY HAZARD AS ARGUED BY PLAINTIFF; DID THE CONDITIONS THAT EXISTED CREATE A HIGH DEGREE OF RISK TO A SIGNIFICANT NUMBER OF WORKMEN AND WERE THEY INHERENTLY DANGEROUS?

VI. DOES THE CASE OF *FULTZ V UNION-COMMERCE ASSOCIATES*, 470 MICH 460; 683 NW2D 587 (2004) SUPPORT PLAINTIFF'S ARGUMENT?

VII. WERE THE TRIAL COURT AND THE COURT OF APPEALS CORRECT IN FINDING THAT THERE WAS NO QUESTION OF FACT THAT THE PIPES PLAINTIFF STEPPED ON WERE OPEN AND OBVIOUS?

VIII. DEFENDANT-APPELLEE TURNER DECLINES TO ADDRESS THIS ARGUMENT AS IT DOES NOT PERTAIN TO TURNER.

IX. WAS THE COURT OF APPEALS CORRECT IN UPHOLDING THE TRIAL COURT WHICH FOUND THAT DEFENDANTS WERE ENTITLED TO MEDIATION (CASE EVALUATION) SANCTIONS?

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COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This matter arises out of a slip and fall incident which occurred on August 3, 1999, on property owned by the Edison Institute a/k/a Henry Ford Museum and Greenfield Village. Plaintiff was employed as a foreman by Conti Electric, assisting in a remodeling project on Edison's property. Conti Electric, under contract with the Edison Institute (Conti Electric Construction Agreement, Hoyt Appendix 31b), agreed to perform and furnish all the electrical work necessary for the Henry Ford Museum Imax Theatre project. Among numerous covenants made in the construction agreement, Conti Electric agreed that the prevention of accidents to workmen was the sole responsibility of Conti Electric and the responsibility and liability for any injury to employees, including employees of Conti Electric, is also assumed by Conti Electric. (Hoyt Appendix 44b, Conti Electric Construction Agreement, Article XXII and Article XXIII).

Defendant Turner Construction entered into a Construction Management Agreement (CMA) with Henry Ford Museum and Greenfield Village (Construction Management Agreement Between Owner and Construction Manager, Hoyt Appendix 49b). Section 2.2.7 entitled "General Conditions Items" states:

> General Conditions Items as used herein shall mean the provision of facilities or performance of work by the Construction Manager for items which do not readily lend themselves to inclusion in one of the separate Trade Contractor Agreements or other items as may be mutually agreed upon in writing between the Owner and Construction Manager. General Conditions Items are, **unless otherwise agreed to by Owner** limited to the following: incidental construction work; preparation for ceremonies; signs; watchmen; field office(s) and related costs thereof such as equipment, furnishings and office supplies; temporary toilets; construction equipment; temporary utility services; clean-up; refuse removal services; trash chutes; surveys; testing; temporary roads and parking. (Hoyt Appendix, 5b).

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Defendant Turner Construction contracted to act as Construction Manager and to provide several construction services, including preliminary evaluations, consultations, scheduling, budgeting, administration and review of the contractors' work and safety programs. (Construction Management Agreement Between Owner and Construction Manager, Article 3 subheadings, Hoyt Appendix 52b). The CMA indicates at Section 3.2.2.1 that all Trade Contractor Agreements shall be between the Owner and the Trade Contractors. Thus, Conti Electric's contract was with the Edison Institute. (Hoyt Appendix 53b).

Section 3.2.5.4 indicates that the Construction Manager shall not be responsible for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work Of The Trade Contractors, since these are solely the Trade Contractors' responsibilities. (Hoyt Appendix 55b). Section 5.3 states that the Construction Manager shall not have any liability for or responsibility under any Trade Contractor Agreement executed by the Owner (Hoyt Appendix 58b).

As indicated above, Plaintiff was a foreman for Conti Electric on the date of the accident. (Turner Appendix 10b). He was in charge of making sure there was enough materials on the site for his workers (Turner Appendix 10b). As a foreman, Plaintiff testified that his daily routine consisted of checking in with the Conti Electric supervisor, obtaining the daily assignments from the Conti Electric supervisor and supervising other Conti Electric employees. It was his responsibility to assign the work and make sure it was done. (Turner Appendix10b). Plaintiff further testified that Conti Electric had its own safety department (Turner Appendix44b). The Agreement between Conti Electric, Inc., Plaintiff-Appellant's employer, and the Edison Institute, the Owner, indicates that Conti agrees that the prevention of accidents to workmen engaged upon or in the vicinity of the Work is its responsibility (Article XXII, Hoyt Appendix 44b). Plaintiff-Appellant testified that

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Conti had its own tool box talks (safety meetings) and that these meetings were not attended by Turner (Turner Appendix 44b). Plaintiff did not take any directions from Turner Construction, report to Turner Construction nor did Turner Construction retain control or direct the work of Conti Electric. Plaintiff acknowledged that because Conti Electric had employees on all three floors of the building, it was necessary that he wander throughout the whole complex during the workday in order to properly supervise the electrical work being completed. (Turner Appendix 13b). He worked on construction sites for twelve (12) years before this accident and he admitted that he was aware that there are trip and fall hazards on every construction site. (Turner Appendix 20-21b). Plaintiff testified that he would have to watch out for such hazards and be vigilant as he walked through a construction site. (Turner Appendix 39b; 42b).

Attached as Plaintiff-Appellant's Appendix 5a is a photograph of the area where Plaintiff allegedly fell. Plaintiff-Appellant's Appeal Brief continuously refers to this area as a "walkway," aisle way or passageway. In fact, it was not a "walkway," "aisleway" or "passageway." It was a "lay down area" where materials were stored. Plaintiff testified during his deposition that the area in question was used by some contractors to store and lay down any surplus of material that may be on the project site to keep it out of the way. (Turner Appendix 22b). Specifically, Conti Electric utilized this area for storing several spools of red, yellow and white electrical wire, which can been seen in the photo on the right side (Plaintiff Appendix 5a). Plaintiff had stored things there before the accident (Turner Appendix 33b). Plaintiff could not deny that he had been in that area before the day of the accident and admits he had been throughout the whole job site many times before the accident (Turner Appendix 33b; 37b).

Conti had installed the lighting in the area where Plaintiff fell. Plaintiff admitted he assigned the lighting work and was responsible for it (Turner Appendix 37b). He could not

differentiate between the amount of lighting in that area or the area where he had just come from (Turner Appendix 33b). At the time Plaintiff entered the area shown in Plaintiff Appendix 5a, Plaintiff states the lighting was adequate, he was not conversing with anyone, he was not carrying anything in his arms, he had a lot on his mind and his vision was not obstructed. (Turner Appendix 30b; 17b; 20b). He had just talked to a co-worker and was going to the second and third floor to check on other workers (Turner Appendix 14b). He came around the gangboxes (Turner Appendix 30b). One of them was Conti's (Turner Appendix 42b). Plaintiff testified that as he entered the "lay down" area, he took two or three steps before he fell (Turner Appendix 42b). Plaintiff does admit to seeing the pipe in question prior to his fall and that there was nothing obstructing his view. (Turner Appendix 20b; 40B; 42b). However, Plaintiff has no explanation as to why he did not take the necessary precautions to avoid the accident in question. (Turner Appendix 21b). He could not say what he was thinking about but that he had a lot on his mind (Turner Appendix 20b; 17b). They were behind schedule (Turner Appendix 7b). It was his first time through the archway (Turner Appendix 15b; 39b).

Plaintiff admits that he had weaved around various other objects to get to that point (Turner Appendix 32b). He admits that since it was his first time through this opening, he should have looked for any potential hazards (Turner Appendix 21b). He admitted he could have easily walked around or stepped over the pipes if he had looked on the floor (Turner Appendix 39b; 44b). He didn't know why he didn't look (Turner Appendix 21b).

Plaintiff's attorney is the only one who refers to this as a walkway. In fact, it is not a walkway nor was it intended as a walkway. There is no evidence it is a "walkway", as seen below. Plaintiff-Appellant admits Turner never said this opening was an aisleway (Turner Appendix 38b). Plaintiff-Appellant admits that there were two other entrances that he could have

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used (Turner Appendix 13b; 38b). Plaintiff-Appellant testified and made a drawing as to where the other actual walkways were that he could have used (Turner Appendix 15-16b; 46b).

Plaintiff-Appellant indicates in his Brief that Duncan Wilson stated that the plywood over the arch had been removed two or three weeks before the accident. In fact, Plaintiff-Appellant only attaches a part of the Answer to Interrogatory No. 7 that Mr. Wilson signed on January 2, 2001, almost one and a half years after the accident, before any other discovery occurred and before any depositions were taken in this matter. Attached hereto as Turner Appendix 2-5b is the complete question and answer to the Interrogatory and question. The accurate quote from that answer states: "I believe they were removed two to three weeks before this accident..." (Emphasis supplied.) Mr. Wilson was subsequently corrected by Plaintiff's own testimony which indicates that the plywood over the archway was taken down earlier in the day of the accident or the night before (Turner Appendix 13b; 37b). Plaintiff would have reason to know the timing of the removal of the plywood better than anybody. The accident happened about 1:00 p.m. (Turner Appendix 13b). He did not know why the plywood was taken down (Turner Appendix 13b). Duncan Wilson, the project superintendent for Turner on this job specifically disagreed that this was a "walkway" or passageway (Turner Appendix 56b; 61b). Mr. Wilson testified that the accepted walkway was an adjacent arch, which had been used and intended as a walkway prior to the plywood being taken down from the archway in question (Turner Appendix 56b). Plaintiff was well aware of this. The area where the Plaintiff fell was a "lay down area" (Turner Appendix 56b). A lay down area is where contractors would store their material in anticipation of, and prior to, installing it on the job site. The pipes in the photo were to be installed in the washrooms in the area immediately above the photograph (Turner Appendix 61b). Mr. Wilson had directed that the plywood be removed from the archway because it was

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his intention to get the foundation opened up for a stairway that was going in at that location (Turner Appendix 58b). He again testified that it was his intention that the contractors use the other archway as an access and not the newly opened archway where a stairway was going to be installed (Turner Appendix 58b). Also, see *supra*, where Plaintiff describes it as a lay down area. Plaintiff testified that the plywood had been removed from the aisleway the night before or the morning of the accident (Turner Appendix 13b; 37b).

Plaintiff has cited the deposition testimony of Michael Wanserski (Plaintiff Brief, p. 28), and Plaintiff indicates that he has attached page 16 of Mr. Wanserski's deposition in his Appendix. In fact, that page (Plaintiff Appendix 45a) is somebody else's deposition and not Michael Wanserski's. All Wanserski indicated on page 16 of his deposition was that once the plywood was removed, people walked back and forth through the opening. Wanserski does not indicate how long the plywood had been down before Plaintiff's accident. He does not indicate if material was still stored there.

Plaintiff also cites the deposition of Brian Muir (Plaintiff Brief, p. 28) and allegedly quotes the testimony of Mr. Muir, asserting that Mr. Muir stated that people were walking back and forth from the old building to the new: "At least for 'several days' before plaintiff's accident." A review of pages 15, 17 and 18 of Muir's deposition, cited by Plaintiff, shows that this alleged quote is totally untrue. Muir testified at page 14 of his deposition that he did not recall when the plywood was removed (Turner Appendix 6b). He indicated that again on pages 15 and 16 of his deposition (Turner Appendix 6b). The only time the words "several days," cited by Plaintiff, were used was on page 18 of the deposition when Plaintiff's attorney used those words in reference to whether or not the pipe laid on the ground for several days after the plywood barricade was removed (Turner Appendix 7b). There is no reference as to when the

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Plaintiff's accident occurred. Mr. Muir confirms that the area of the accident was a lay-down area at page 18 of his deposition (Turner Appendix 7b). To be more perfectly clear, at page 42 of his deposition, Mr. Muir was specifically asked by Plaintiff's attorney: "How long after the plywood was removed did the accident occur?" Mr. Muir answered: "I can't tell you that, either." (Turner Appendix 8b).

Plaintiff-Appellant asserts that this case involves a failure to clean up and further claims that there was debris or waste left in the area where Plaintiff fell. In fact, the pipes, electrical wire and other items seen in the photograph of the area of the fall (Plaintiff-Appellant's Appendix 5a) is not debris, but rather is material that was being installed on the job. Plaintiff's own testimony confirms this. Plaintiff himself testified that he had stored Conti Electric wiring in that area before the day of the accident (Turner Appendix 33b) (Plaintiff-Appellant's Appendix 5a). (The Conti Electric red and yellow spools of wire can be seen on the right on said photograph). The photograph (Plaintiff-Appellant's Appendix, 5a) shows the open and obvious condition of the area.

Plaintiff-Appellant continuously states that there was a need to clean up this storage area. Plaintiff implies that there was some type of garbage or waste material on the floor that needed to be "cleaned up." As indicated herein, the material that was stored there was material that was going to be installed on the construction project. As indicated herein, Plaintiff's own company had stored electrical wiring there. Plaintiff testified he knew that it was a storage area and had been through that area before. The copper pipes were not waste material and were many feet long (see Plaintiff-Appellant's Appendix 5a).

After all parties had filed Witness Lists, after all discovery was over, after Plaintiff answered Interrogatories regarding experts, after mediation, and after Defendant-Appellee

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Turner filed its Motion for Summary Disposition on June 26, 2001, Plaintiff-Appellant filed an Amended Witness List dated August 30, 2001, adding a purported expert, Robert Pachella. All Defendants filed Objections to that Witness List. Defendant-Appellee Turner filed a Motion to Strike the Witness List, which was scheduled to be heard on the same date as Defendant-Appellee Turner's Motion for Summary Disposition. Since the Court granted the Motion for Summary Disposition, the Motion to Strike Robert Pachella as a witness was never heard (Hoyt Appendix 374-375b). Despite that, Plaintiff-Appellant has attached the report of Robert Pachella and uses it in his Appeal Brief, which this Defendant-Appellee believes is inappropriate. The trial court did review and comment on the opinion of Robert Pachella (Hoyt Appendix 375b). Plaintiff-Appellant's Brief, p. 8 purports to quote the trial judge who commented after reviewing the Affidavit of Pachella. The more accurate quote of the trial judge is: "I don't have a problem with him opining that Ghaffari didn't have enough foreview to avoid the incident that happened to him. I think that's true. That just means that when you are walking around a corner when you enter a doorway, you need to be more careful. It doesn't change my ruling. My ruling stands." (Hoyt Appendix 376b). The trial court chose not to agree with Pachella's opinion. In any event, as seen below, Plaintiff-Appellant's own testimony shows that he was not distracted by the materials stored in the area where he fell as Pachella asserts.

Plaintiff improperly attaches and refers to the accident report (which was filled out in part by Plaintiff and his supervisor, Chris Mamp) (Plaintiff Appendix 103a) in his Appeal Brief. It was not submitted to or used by the Trial Court at the Motion for Summary Disposition. Some of the portions of the report were filled in by the Plaintiff (Turner Appendix 12b; 31b; 49b) and some portions by Chris Mamp (Turner Appendix 31b; 49b). Matthew Ressler, who had just graduated from college in May of 1999, and thus, had been working for Turner Construction less

than three months, signed the accident report. He testified that he did not fill out that portion of the report that referred to "unsafe acts" and "unsafe conditions" (Turner Appendix 51b). He testified that it would have been filled out by Louie Ghaffari or Chris Mamp (Turner Appendix 49b). Thus, there was no "admission" by Turner as claimed by Plaintiff. In any event, this should not be considered on appeal as it was not submitted to or used by the trial court at the Motion for Summary Disposition. *Zwolinski v Dept of Transportation,* 205 Mich App 532; 517 NW2d 852 (1994). See also, Defendant Turner's Motion to Strike Plaintiff's Brief and Appendix filed with this Court on January 10, 2005.

After testifying he was surprised Plaintiff fell because Plaintiff knew about the pipes laying there, Matt Ressler was asked at his deposition by Plaintiff-Appellant's attorney whether or not Ressler felt the accident was Plaintiff-Appellant's fault. Ultimately, Mr. Ressler was asked what he meant regarding fault and he testified, "No one ever wants to hurt themselves," meaning that he did not believe Plaintiff-Appellant intended to get hurt (Turner Appendix 50b).

Plaintiff-Appellant states that Plaintiff was "distracted" when he came around the corner just prior to his fall. Plaintiff-Appellant's Brief, page 4, states that there were other pipes that were up higher in the area that distracted his client. In fact, Plaintiff testified that he did not recall if he saw the other pipes before he fell (Turner Appendix 19b) and that nothing obstructed his view for two or three steps before he fell. (Turner Appendix 42b). He did not recall if he saw the scaffolding in that area before he fell (Turner Appendix 21b). Thus, the assertion Plaintiff was "distracted" when he came around the corner completely fails. As Plaintiff himself testified, he had worked at construction sites for over twelve (12) years and was fully aware of dangers on construction sites and that he must watch out where he was walking, especially when walking through an area for the first time (Turner Appendix 39b; 42b). Plaintiff's attorney further makes

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the argument that noise on a construction site might distract the person. There is no testimony or evidence that any noise distracted Plaintiff and no showing that noise itself can distract said person from watching where he is walking.

Plaintiff-Appellant implies that this was an unsafe project. The depositions of employees/former employees of other subcontractors reveal that this is untrue. The deposition of Richard Wanserski, a foreman with former Defendant, Acoustical Ceiling, who has 30 years experience in the construction trades, testified that Duncan Wilson was "one of the most, if not the most safety conscious person he had ever dealt with" and that Mr. Wilson was "very vigilant looking for safety issues". (Turner Appendix 92b). Michael Wanserski formerly with Acoustical Ceiling but with Diversified Construction at the time of his deposition, testified that Duncan Wilson was very safety conscious and if Duncan saw something out of order he would tell somebody to fix it or clean it up. He testified Duncan was on us (error in transcript) about clean up constantly. (Turner Appendix 90b). Norby Wickham, a general field superintendent with Acoustical Ceiling for 15 years testified that he had no need to complain about any type of job site safety. (See Norby Wickham's deposition transcript marked as Turner Appendix 94b). Dave Kunath, a supervisor for Hoyt Brum and Link for over 10 years testified that Duncan Wilson was very safety conscious and that if he ever had any questions or problems about safety he could talk to Duncan Wilson about that. (See Dave Kunath's deposition transcript marked as Turner Appendix 96).

Plaintiff asserts on page 7 of his Brief that there were "weekly safety meetings held by Turner which the trades were required to attend" and for which he gives no reference or cite. Even Plaintiff couldn't confirm that and indicated his employer, Conti, held their own safety meetings (toolbox talks) (Turner Appendix 44b). Brian Muir confirmed Guideline Mechanical

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also held their own safety meetings but not with Turner (Plaintiff Appendix 48a). The Construction Agreements with the contractors required them to handle safety issues, e.g., see Conti's Agreement (Hoyt Appendix 44b;55b, Article XXII).

Plaintiff also argues and implies that Turner had laborers on the job at the time of this accident to help clean up and that this area was an area that had debris in it that needed to be cleaned up. In fact, Turner did not hire laborers until later on, i.e. September, when the project was nearing completion. Duncan Wilson testified that laborers were not hired until September for purposes of clean up, when the entire project was close to completion and then this expense was back charged to the contractors who had failed to clean up after completing their work (Turner Appendix 55b).

Plaintiff argues in his Brief that there was debris or waste material that needed to be cleaned up. As seen above, there is no evidence that there is any "debris" or "waste material" that needed to be cleaned up. The items stored in the area where Plaintiff fell was material that was going to be incorporated into the project. Plaintiff knew this. Plaintiff's own employer had electrical spools of wire stored there. Plaintiff has cited paragraph 2.2.8 (Hazardous Material) of the Construction Management Agreement, which was not previously cited or argued in his Response to the Motion for Summary Disposition, and it is improper to raise that now. There is no evidence or testimony that there was any "hazardous" material in the area. The testimony indicates that all of the material stored there was going to be incorporated into the construction project, and that this was a "lay down" area for the storage of such material.

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ARGUMENT

I. THE OPEN AND OBVIOUS DOCTRINE SHOULD APPLY TO A CLAIM UNDER THE COMMON WORK AREA DOCTRINE DESCRIBED IN *ORMSBY v CAPITAL WELDING, INC.*, 471 MICH 45; 684 NW2d 320 (2004), ALTHOUGH DEFENDANT APPELLEE DOES NOT BELIEVE THAT THIS ACCIDENT OCCURRED IN A COMMON WORK AREA.

The case of *Ormsby v Capital Welding, Inc,* 471 Mich 45; 684 NW2d 320 (2004), states as follows:

> That is, for a general contractor to be held liable under the "common work area doctrine" a plaintiff must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.

Ormsby, *supra*, at 54.

Defendant-Appellee does not believe that the common work area applies, as set forth below, but to answer this Court's question, the open and obvious doctrine should apply to a claim under the common work area doctrine. That doctrine requires the property owner or general contractor to guard against readily observable and avoidable dangers. If such dangers are readily observable and avoidable, they are just as easily avoidable by any individual on the job site, including any employee of a contractor, and such individual has a duty to watch out for his own care and safety. Otherwise, the "common work area doctrine" would devolve in practice into a strict liability regime where general contractors or construction managers would be responsible for any common work area injury that an employee of an independent subcontractor suffers. This concern was set forth by Justice Coleman in her dissent in *Funk v General Motors Corp,* 392 Mich 91; 220 NW2d 641 (1974), and as noted in *Ormsby, supra,* at 56.

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As this Court is aware, at common law, property owners, construction managers and general contractors *generally* could *not* be held *liable* for the negligence of independent subcontractors and their employees. See *Ormsby, supra,* at 48. *Funk, supra,* set forth a new exception to this general rule of non-liability, but only under the four conditions set forth in the "common work area doctrine." As indicated in *Ormsby*, the *Funk* Court desired to limit the scope of a general contractor's supervisory duties and liability. Each subcontractor is generally held liable for the safe operation of its part of the work. See *Ormsby* at 57.

In the instant case, the condition of which Plaintiff complains was an open and obvious condition. The testimony of the Plaintiff reveals this. Louis Ghaffari testified that he worked on construction sites for 12 years before this accident (Turner Appendix 20-21b) and he admitted that he was aware that there are trip and fall hazards on every construction site (Turner Appendix 42b). He knew that he would have to watch out for such hazards and be vigilant as he walked through a construction site (Turner Appendix 21b; 39b).

Part of Ghaffari's duties were to take care of the materials needed by Conti Electric, his employer, at the job site in order for Conti to do their job (Turner Appendix 10b). Conti had some of their wiring stored in the area where Plaintiff fell and that wiring can be seen in the right side of the photograph marked as an exhibit at Plaintiff's deposition (Plaintiff Appendix 5a), which is directly adjacent to where Plaintiff fell (Turner Appendix 22b). This area is also known as a "lay-down" area (Turner Appendix 22b). Plaintiff admitted that Conti had stored things in that area before the date of the accident (Turner Appendix 33b). Plaintiff could not deny that he had been in that area before the date of the accident and admits that he had been through the whole job site many times before the accident (Turner Appendix 33b).

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Duncan Wilson, the project superintendent for Turner on this job, specifically disagreed that this was a "walkway" or passageway (Turner Appendix 56b; 61b). Mr. Wilson testified that the accepted walkway was an adjacent arch, which had been used and intended as a walkway prior to the plywood being taken down from the archway in question (Turner Appendix 56b). Plaintiff, himself, testified that there were two other entrances or archways that he would have used besides the one where he fell (Turner Appendix 13b; 38b). Plaintiff even made a drawing wherein he described this in his deposition (Turner Appendix 15-16b). See said drawing showing the other doorways that he drew (Turner Appendix 46b). Plaintiff admitted Turner had never told him that the area where he fell was an aisleway (Turner Appendix 38b).

Plaintiff testified that as he came around the wall next to the gang boxes, he took 2 or 3 steps before he fell (Turner Appendix 42b). He admits that there was nothing obstructing his view (Turner Appendix 42b). He testified he could not say what he was thinking about, that he had a lot on his mind, that he was not carrying anything and not talking to anybody (Turner Appendix 17b). He indicates he had weaved around various other objects to get to that point (Turner Appendix 32b). He admits that since this was the first time he walked through the doorway, he should have looked for any potential hazards (Turner Appendix 21b). He had no explanation as to why he did not look or why he did not see the pipes before he stepped on them (Turner Appendix 35b). He admitted he easily could have walked around or stepped over the pipes and there was enough room to do so, if he had seen them before he stepped on them (Turner Appendix 20b; 44b).

Plaintiff again admitted that there was nothing obstructing his view of the pipes on which he fell (Turner Appendix 20b). He testified that when he was in that area on prior occasions he

saw pipes "probably stored on the floor" (Turner Appendix 33b). He admits that he did nothing to observe or to look out for trip hazards in the area where he fell (Turner Appendix 21b).

As indicated above, Defendant-Appellee does not believe that the "common work area doctrine" applies to the facts of this case. Defendant-Appellee was not the property owner or a general contractor on this project. Defendant-Appellee was a construction manager (Hoyt Appendix 50b). Plaintiff's employer, Conti Electric, entered into a contract with the owner requiring Conti to prevent accidents to its workmen and that Conti had the sole responsibility to do so. Conti was also responsible for injury to employees, including employees of Conti Electric (Hoyt Appendix 44b, Article XXII and XXIII).

Plaintiff's Second Amended Complaint alleges negligence in failing to maintain the premises, i.e., failing to provide a safe place to work (Hoyt Appendix 12b, paragraph 7), but Plaintiff then argues that *Lugo*, *infra*, does not apply because Defendants did not possess the premises (Plaintiff's Brief, p. 5). This is contradictory. Clearly L*ugo, infra*, applies

As indicated in *Ormsby*, the "retained control doctrine" is merely a subordinate doctrine to the common work area doctrine. In the instant case, Turner did not retain control over the work of Plaintiff. Plaintiff admits this. Plaintiff indicated his daily routine consisted of checking in with the Conti Electric supervisor, obtaining the daily assignments from the Conti Electric supervisor, and supervising other Conti Electric employees. It was his responsibility to assign the work and make sure it was done. He testified Conti Electric had its own safety department (Turner Appendix 44b). He testified that Conti had its own tool box talks (safety meetings) and that these were not attended by Turner (Turner Appendix 44b). Plaintiff did not take any directions from Turner, report to Turner, nor did Turner Construction retain control or direct the

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work of Ghaffari. Thus it is clear that Turner did not retain control such that the retained control doctrine applies.

A further element of the common work area doctrine requires that there be a "high degree of risk to a significant number of workmen." In the instant case, pipes that are stored on the floor of a storage area, that are in plain view and that can easily be seen (Plaintiff's Appendix 5a), as Plaintiff has so acknowledged, do not create a high degree of risk. In addition, the storage area where these pipes were located was not used by a significant number of workmen. Conti stored their wire there and the owner of the pipes stored their pipes there. As testified to by Plaintiff, this storage area had been "opened up" by the removal of a piece of plywood covering an archway, either the morning of the accident or the afternoon before. There is no testimony or evidence that a significant number of workmen had ever used or been through this storage area or this lay-down area prior to the accident, as *Ormsby* requires, *supra* at 60.

Finally, the area where the accident occurred was not a "common work area." It was a "lay-down" area or a storage area. The *Ormsby* case, *supra*, examined the case of *Hughes v PMG Building,* 227 Mich App 1; 574 NW2d 691 (1997), where an employee was injured on an overhang of a porch. It was argued that this was a "common work area." The court concluded that it was not and went on to state that if the overhang was considered a "common work area for purposes of subjecting the general contractor to liability, then virtually no place or object located on the construction premises could be considered not to be a common work area." This was not the result the Supreme Court intended and the Supreme Court desired to limit the scope of a general contractor's supervisory duties and liability. *Ormsby, supra*, at 57. The court further pointed out that each subcontractor is generally held responsible for the safe operation of its part of the work. *Ormsby, supra,* at *57.*

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The area where Plaintiff was injured did not present a high degree of risk to a significant number of workers. The "high degree of risk" portion of this doctrine applies to the conditions that existed at the time the worker is injured. *Ormsby, supra* at 60. Thus, the facts that existed (that this was a storage area) at the time of the Plaintiff's accident confirm that the "common work area" doctrine does not apply to this case. The "open and obvious" doctrine does apply and bars Plaintiff's claim.

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II. THE OPEN AND OBVIOUS DOCTRINE CAN BE RECONCILED WITH *HARDY v MONSANTO ENVIRO-CHEM SYSTEMS, INC.*, 414 Mich 29; 323 NW2d 270 (1992), AS SAFETY IN THE WORKPLACE CAN STILL BE ENHANCED BY THE APPLICATION OF PRINCIPLES OF COMPARATIVE NEGLIGENCE.

The case of *Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29; 323 NW2d 270 (1992), involved a situation where the court ruled that a general contractor's negligence in failing to provide an "adequate safety device" was still subject to the comparative negligence defense. In *Hardy*, the alleged inadequate safety device was the placement of pieces of plywood covers over roof openings. The trial court allowed the defendants to raise the defense of contributory negligence which resulted in a jury decision which completely barred the plaintiff from any recovery. The *Hardy* decision reversed the trial court and held that the defense of comparative negligence should be used.

In the instant case, there is no issue regarding an "adequate or inadequate safety device," so Defendant-Appellee does not believe that the *Hardy* case applies to the instant situation. In any event, the open and obvious doctrine can still be reconciled with the principles of comparative negligence and can promote safety in the workplace.

As indicated in *Hardy*, "at some point a worker must be charged with *some* responsibility for his own safety-related behavior. ...Comparative negligence enhances the goal of safety in the workplace under these conditions, since it gives the worker some financial incentive to act in a reasonable and prudent fashion. The comparative negligence rule also enhances safety in the workplace by rewarding safety-conscious contractors." *Hardy, supra,* at 41.

The *Hardy* court examined various possibilities regarding the use of the doctrine of comparative negligence in contrast to the contributory negligence rule. The *Hardy* court concluded that: "To the extent, however, that 'ordinary inadvertence' is merely a euphemism for

a worker's negligence, it should reduce a worker's recovery." *Hardy, supra* at 43. The *Hardy* court went on to conclude that they were "observing the genesis of a new jurisprudence to be called 'safety device' law." *Hardy, supra*, at 44.

The *Hardy* court then went on to quote, *Placek v Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979): " 'What pure comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice.' " *Hardy, supra* at 45 (emphasis supplied).

Finally, *Hardy* concludes that, "The application of comparative negligence to *all* workplace negligence satisfies the *Funk* polices as well as encourages safer behavior by both contractors and workers." *Hardy, supra*, at 47.

The instant case involved the area where two contractors had stored their materials which were being used and incorporated into the premises under construction. Plaintiff's own employer, Conti Electric, had stored electrical wire in that storage area (Turner Appendix 22b). The spools of electrical wire can be seen in the photo produced by Plaintiff (Plaintiff's Appendix 5a). Plaintiff, himself, admitted he had been in that area many times previously (Turner Appendix 33b). As construction progressed, it became necessary to remove the barricade over the archway as a stairway was going to be placed in that area (Turner Appendix 58b). Pursuant to Plaintiff's testimony, this had occurred either that morning or the afternoon before (Turner Appendix 37b; 13b). There was no other change to this storage area. The actual walkway that had been designated previously was still in place and was still intended to be the walkway to be used (Turner Appendix 56b). This new opening did not become a designated walkway and was not intended as such (Turner Appendix 56b). Even Plaintiff admits no one told him it was a walkway (Turner Appendix 38b). It was his sole decision to walk through that opening. He was

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taking a shortcut to a different area of the project. It was the first time he had done so. He did not use ordinary care and caution. He admits that he did not stop and look before he entered that area from a direction he had never used before (Turner Appendix 39b). The conditions there were open and obvious. Even Plaintiff admits that if he had merely stopped and looked, he would have seen the pipes and would have been able to avoid them (Turner Appendix 39b). Thus, the open and obvious doctrine can still be reconciled with principles of comparative negligence. As indicated in *Hardy*: "What pure comparative negligence does is hold a person fully responsible for his or her actions and to the full extent to which they cause injury." *Hardy, supra*, at 45. The open and obvious doctrine does just that. If a condition is open and obvious, there is no liability to the injured party unless there are special aspects that made it unreasonably dangerous. See *Lugo v Ameritech Corporation, Inc*, 464 Mich 512; 629 NW2d 384 (2001). The storage of pipes on the floor in the storage area was open and obvious and previously known to Plaintiff. His own material was stored nearby. There were no special aspects. Plaintiff does not even try to show any special aspects. There was nothing unreasonably dangerous about the conditions. All Plaintiff had to do was stop and look before he entered. He admits as much. Thus, the open and obvious doctrine can easily be reconciled with the *Hardy, supra*, decision, although, as indicated, Defendant-Appellee does not believe that *Hardy* applies to the instant situation based upon the differing factual situations in the two cases, i.e., no "safety device.".

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III. PLAINTIFF'S CLAIMS AGAINST HOYT, BRUM AND LINK AND GUIDELINE MECHANICAL ARE BARRED BY THE OPEN AND OBVIOUS DOCTRINE.

Although this Argument is not directed to Defendant-Appellee Turner Construction, since it is Turner Construction's position that Plaintiff's claims against it are barred by the open and obvious doctrine, similarly, Plaintiff's claims against Hoyt, Brum and Link & Guideline Mechanical should also be barred by the open and obvious doctrine as further set forth in this Brief.

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IV. THERE WERE NO "HAZARDS" THAT WERE REQUIRED TO BE REMOVED PURSUANT TO MIOSHA AND OSHA AS ARGUED BY PLAINTIF AND, IN ANY EVENT, MIOSHA AND OSHA SPECIFICALLY DO NOT ENLARGE OR DIMINISH OR AFFECT IN ANY OTHER MANNER THE COMMON LAW OR STATUTORY RIGHTS, DUTIES OR LIABILITIES OF EMPLOYERS.

Plaintiff-Appellant assumes and argues that there were "hazards" that needed to be removed in the area where Plaintiff fell. As indicated above, Plaintiff fell in a storage area where various plumbing pipes and, indeed, spools of electrical wire to be used by Plaintiff's employer, Conti Electric, were stored (Turner Appendix 22b). Plaintiff had been in that storage area before the accident (Turner Appendix 33b). These items were not "debris" or "waste material" that needed to be disposed of as claimed and argued by Plaintiff. The pipes and electrical wire were products that were stored and going to be installed at the building (Turner Appendix 61b)when the appropriate time came. Materials and products need to be stored at construction sites so that they can be used as construction of the building proceeds.

Plaintiff cites paragraph 2.2.7 of the General Condition items of the contract between Turner and Edison. Plaintiff did not cite the entire paragraph which Defendant-Appellee has set forth on page one of the Counter-Statement of Facts. It is clear that the "clean-up" referred to therein is general, incidental clean-up required at the end of a construction project and said paragraph indicates "general condition items are, **unless otherwise agreed to by owner** limited to the following..." In fact, the owner did agree otherwise with Conti Electric. In Edison's agreement with Conti, Article II, last paragraph, contained on p. 2 of said Agreement it states: "Contractors shall be solely responsible for <u>all</u> construction means, methods, techniques, sequences, and procedures and for <u>safety precautions and programs</u> in connection with the work, and hereby agrees hereto that neither Turner nor the architect will be responsible therefor or have

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control or charge thereof." (Hoyt Appendix 36b) (emphasis supplied). Further, Duncan Wilson testified that each contractor was responsible for its own clean-up (Turner Appendix 55b). If a contractor did not clean up, Turner would arrange for clean-up and back-charge that contractor. This would occur at the end of the contractor's work (Turner Appendix 55b).

The trial court commented on Article 2.2.7 and indicated that it meant that "you go to the subs and tell the people that supervise the subs you need to clean up your area. That's not retaining control. That means that he, in fact, didn't retain control." (Hoyt Appendix 324b).

In any event, as set forth above, the pipes in question were not items that needed to be "cleaned up," as they were not debris or waste material, but rather material to be installed at the project in washrooms above the area of the photo (Turner Appendix 61b).

Plaintiff next argues that the open and obvious doctrine should not apply pursuant to MIOSHA and OSHA regulations. Plaintiff ignores MCL 408.1002(2) which expressly provides that MIOSHA does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of or in the course of, employment." 29 USC 653(b)(4) contains an identical provision, thereby preventing OSHA from enlarging employers' statutory duties. *Zalut v Andersen & Assoc, Inc.*, 186 Mich App 229; 463 NW2d 236 (1990) does not elevate MIOSHA regulations into duties that would apply in a negligence context. Certainly, MIOSHA can impose a fine or criminal penalties, but those are not issues involved in this case. Plaintiff cites no authority indicating that an OSHA regulation could be used to establish a statutory duty in a negligence context.

The Construction Agreement entered into between Edison Institute and Plaintiff's employer, Conti Electric, specifically describes the scope of work (Turner Appendix 99b, first

paragraph) and that the agreement includes compliance with all agencies (city, county, state, federal as may be required), all other services and facilities and all other things necessary for the performance of the Electric Work.

Plaintiff argues that the Court of Appeals' decision in this matter conflicts with the decision in *Jones v Enertel, Inc*, 467 Mich 256; 650 NW2d 334 (2002). The *Jones* case involved an entirely different situation. The plaintiff in that case alleged injuries due to the failure of the City of South Lyon to maintain a sidewalk in reasonable repair. There is a specific statute, MCL 691.1402(1) which is part of the Governmental Tort Liability Act, which imposes a general duty on municipalities to keep a sidewalk in reasonable repair and which allows for recovery for the failure to keep a sidewalk in reasonable repair. Thus, the *Jones* case involves a specific statute which allows recovery against a governmental agency. Neither of these facts are involved in the instant case.

Plaintiff also cites the case of *Teal v E.I. DuPont de Nemours & Co*, 728 F2d 799 (6th Cir. 1984). Again, this case is entirely different. It arose and was decided under Tennessee law which apparently allows for an instruction regarding violation of a statute which is negligence per se. As indicated above, that is not the law in the State of Michigan. Plaintiff also cites *Barker Brothers Construction v Bureau of Safety and Regulation*, 212 Mich App 132; 536 NW2d 845 (1995). In that case, a company, whose owners were acting as the workers/employees, was cited by MIOSHA on three occasions for working in an unshored trench. The owners appealed the citations. The Court upheld the citations. The facts of that case have no application to the instant case.

Private lawsuits are not the mechanism for the enforcement of MIOSHA standards. *White v Chrysler Corp*, 421 Mich 192, 199; 364 NW2d 619 (1984). As the Court of Appeals

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noted in its decision in *Ghaffari v Turner Construction Co*, 259 Mich App 608; 676 NW2d 259 (2003), violation of the MIOSHA standards allows an employee or his representative to request an inspection by the appropriate department of the State. MCLA 408.1028. The employer who violates a standard can be assessed a fine or can be found guilty of a misdemeanor or a felony. MCLA 408.1035. As indicated herein, private lawsuits are not the mechanism to enforce MIOSHA standards.

Despite Plaintiff's argument to the contrary, the owner did take steps with regard to job safety. The Construction Agreement with each contractor such as Conti required them to be responsible for safety (Hoyt Appendix 44;55b). Each contractor held their own safety meetings (Turner Appendix 44b; 7b).

There were no "hazards" that needed to be removed. MIOSHA and OSHA do not apply in the manner Plaintiff argues and do not affect the common law or statutory rights, duties or liabilities of employees.

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V. THE AREA WHERE THIS ACCIDENT OCCURRED WAS NOT A COMMON WORK AREA, THE PIPES STORED ON THE FLOOR DID NOT CONSTITUTE A SAFETY HAZARD AS ARGUED BY PLAINTIFF, THE CONDITIONS THAT EXISTED DID NOT CREATE A HIGH DEGREE OF RISK TO A SIGNIFICANT NUMBER OF WORKMEN AND WERE NOT INHERENTLY DANGEROUS.

Plaintiff's employer, Conti Electric, entered into an agreement with the owner, Edison Institute, which indicated that Conti Electric agreed to be responsible for the prevention of accidents to workmen engaged upon or in the vicinity of the work (Hoyt Appendix 44b). Plaintiff himself testified that Conti had its own tool box talks (safety meetings) (Turner Appendix 44b).

Turner Construction was a construction manager and not a general contractor on this project (Hoyt Appendix 50b). For a general contractor to be held liable under the "common work area doctrine" a plaintiff must show that (1) the defendant, either the property owner or the general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. See *Ormsby*, *supra,* and *Funk*, *supra*.

Plaintiff himself testified that the area where this accident happened was a storage area (Turner Appendix 22b). Conti Electric had stored their own product in this area (Plaintiff Appendix 5a). As seen in the photograph, it was still a storage area when this accident occurred. As testified by Plaintiff, the barricade blocking the archway had been taken down either on the morning of the accident or the afternoon before (Turner Appendix 37b; 13b). Plaintiff admitted no one from Turner told him this was now an aisle way. Duncan Wilson of Turner Construction denied that it was an aisle way (Turner Appendix 56b). Despite Plaintiff's attorney's argument

that it was a much used passageway, it was not and could not have been since the barricade had just been taken down.

Plaintiff's attorney has cited testimony of Michael Winserski and Brian Muir, which testimony was never quoted or used by the trial court. In any event, that testimony merely indicates that others had used the archway. It does not show others used the archway before the accident. It does not mean it was a common work area or show that there is a high degree of risk to a significant number of workers. If anything, it shows there was no high degree of risk to a significant number of workers, as no other worker claimed any injury as a result of using that archway. Further, Plaintiff himself agreed that the other doorways that had been used to enter the area where the gang boxes were stored were still available (Turner Appendix 38b). Duncan Wilson confirmed this (Turner Appendix 56b).

Plaintiff misquotes and distorts the language in the Court of Appeals' opinion in this matter. On page 29 of his brief where he purports to quote the Court's own words making this a "high traffic area where a significant number of workers would be passing through on a daily basis," contains an inaccurate quote. In fact, the Court of Appeals stated:

> Here, we are not persuaded that the pipes on the floor posed a "high risk to a significant number of workers." The evidence suggested that the pipes were on the floor in a *storage area*, in contrast to a high-traffic path where a significant number of workers would be passing through on a daily basis. Therefore, we conclude that this exception does not apply to the facts of the instant matter. (Emphasis in original.) *Ghaffari v Turner Construction Co,* 259 Mich App 608; 676 NW2d 259 (2003).

Thus, the general rule of non-liability at common law of an owner, a general contractor or construction manager still applies to this factual situation and there is no liability against Turner.

Plaintiff admitted that he had been in the storage area before the day of the accident and had been throughout the whole job site many times before the accident (Turner Appendix 33b).

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Plaintiff admitted that Conti Electric installed the lighting in the area where he fell and that he was responsible for assigning that work (Turner Appendix 37b). He admits that the lighting was adequate, he was not conversing with anyone, he was not carrying anything, and his vision was not obstructed at the time the accident occurred (Turner Appendix 30b; 17b; 20b). Plaintiff testified that as he entered the "lay down" area he took two or three steps before he fell (Turner Appendix 42b). He admits to seeing the pipe in question prior to his fall and there was nothing obstructing his view (Turner Appendix 20b; 42b). Plaintiff admits he had weaved around various other objects to get to that point (Turner Appendix 32b). He admits that since it was his first time through this opening, he should have looked for any potential hazard (Turner Appendix 21b). He admitted he could have easily walked around or stepped over the pipes (Turner Appendix 39b; 44b). Thus, Plaintiff's argument that the "pipes were not visible" must fail. Plaintiff admits that if he had looked, he would have seen them. Plaintiff could have walked straight through the archway instead of coming around the corner at an angle (Plaintiff Appendix 5a).

Plaintiff quotes the affidavit of Christopher Mamp. As correctly pointed out by the trial court, much of the statements in that affidavit are inadmissible, such as where Mamp claimed that the pipes were not visible to Ghaffari, that the gang boxes blocked Ghaffari's view, that Ghaffari simply couldn't see the pipes on the floor until he was right on top of them, that other pipes and boxes were a hazard to Ghaffari and that they would have distracted Ghaffari's attention. As indicated by the trial court during the argument for summary disposition, those statements are not admissible and were mere speculation (Hoyt Appendix 348 b-350b). Mamp's statements that other material left in the walkway would distract a person from seeing the copper

pipes is further speculation and, in any event, Mamp is not any expert who can testify competently to those facts.

Plaintiff again cites the opinion of Robert Pachella. This was an expert witness that Plaintiff added late by filing an Amended Witness List on August 30, 2001, long after witness lists were due, after mediation and after Turner filed its Motion for Summary Disposition. In any event, the trial court disagreed with the opinion of Pachella, indicating Plaintiff needed to be more careful (Hoyt Appendix 375b-376b).

Plaintiff asserts that the pipes were invisible (Plaintiff's Brief p 30). Clearly, the pipes were visible and can clearly be seen in the photo (Plaintiff's Appendix 5a). Plaintiff himself admits he would have seen the pipes had he looked and he did see the pipes before he stepped on them (Turner Appendix 39b; 40b; 42b; 20b).

Clearly, the area was a storage area. Material were still stored there, including that of Conti Electric (Plaintiff Appendix 5a). Just because a barricade was taken down so that a stairway could be installed in that area, does not make the archway a walkway. Plaintiff had never used it as a walkway before. The barricade was down for possibly only a couple of hours, but no more than 24 hours (Turner Appendix 37b; 13b). The other doorways were still available and intended to be used by workers as doorways (Turner Appendix 13b; 38b; 56b).

Plaintiff again refers to MIOSHA and OSHA and again distorts and ignores the contents of those regulations. Plaintiff cites MIOSHA Rule 408.40119. Plaintiff does not provide the court with the heading of that rule which is: "Housekeeping and Disposal of Waste Materials." A review of that rule shows that it refers to "scrap," "debris," and "garbage." As seen herein, the pipes in question were not "scrap," "debris," or "garbage." Said rule refers to a work area or aisle. As indicated above, this was not a work area or aisle. It is clear from reviewing the OSHA

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regulation that it is similarly referring to scrap, debris or garbage and not material that is to be used on a construction site.

Plaintiff again refers to the Accident/Incident Report which was never made an exhibit or used by the trial court in reaching its decision in this matter and thus should be stricken and ignored in this record. (Defendant has a Motion to Strike Plaintiff's Brief and Appendix pending with this Court.) It further should be pointed out that Plaintiff himself and his supervisor, Chris Mamp, filled out portions of that report (Turner Appendix 12b; 31b; 49b; 51b). There was no "admission" as Plaintiff states. Further, the report contains subsequent remedial measures which should be inadmissible. *Ellsworth v Hotel Corp of America*, 236 Mich App 185; 600 NW2d 129 (1999), appeal denied 461 Mich 997; 610 NW2d 923. Finally, it only makes sense that if somebody has reported an accident due to their own failures and inattention, then a construction manager would remove those items so nobody else does the same thing.

It was Plaintiff's own inattention that caused this accident. He walked around a sharp corner without looking where he was going, even though he had been in that storage area before. He admits that he saw the pipes before he stepped on them. He admits that if he had stopped and looked, he could have avoided them. The pipes were clearly visible to anybody who was paying attention and looking where they were going. This was not a passageway that was designated for use and Plaintiff had other passageways to use.

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VI. THE CASE OF *FULTZ V UNION-COMMERCE ASSOCIATES*, 470 MICH 460; 683 NW2D 587 (2004) DOES NOT SUPPORT PLAINTIFF'S ARGUMENT SINCE A TORT ACTION WILL NOT LIE WHEN BASED SOLELY ON THE NON-PERFORMANCE OF A CONTRACTUAL DUTY, AND SINCE TURNER OWED NO CONTRACTUAL DUTY TO PLAINTIFF.

In the *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004) decision, the court held that there is no tort action available when it is based on the alleged non-performance of a contract. That is exactly what Plaintiff is attempting to impose in this case against Turner. Therefore, *Fultz* clearly does not assist Plaintiff since Plaintiff is arguing that Turner failed to perform contractual obligations or enforce contractual obligations requiring others to clean-up and remove safety hazards, which *Fultz* indicates is not a cause of action available to Plaintiff.

As stated previously in this brief, Plaintiff's allegations assume that there was something that needed to be "cleaned up." As stated previously, the pipes that Plaintiff stepped on were not debris, scrap, waste material or garbage. They were materials that were to be used in the construction of the project in question. They were stored in a storage area. They did not need to be "cleaned up."

Plaintiff further assumes that they were hazards. Again, the pipes were not hazards. They were stored in a storage area. They were stored next to materials stored by Plaintiff's employer in a storage area. Plaintiff had been in that storage area numerous times before (Turner Appendix 33b). Plaintiff was responsible for supervising the installation of lighting in that storage area (Turner Appendix 37b). Plaintiff admitted that if he had stopped and looked when he came around the corner of the archway, he could have and would have seen the pipes on the floor and could have and would have been able to step over or walk around them (Turner

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Appendix 39b; 44b). The photograph submitted by Plaintiff (Plaintiff's Appendix 5a) clearly shows that Plaintiff had to take a few steps after he came around the corner of the archway in order to even get to the pipes.

Each contractor, including Plaintiff's employer, Conti Electric, agreed to set-up and enforce safety measures. (Hoyt Appendix 44b). Conti had their own safety department and had their own safety meetings for this job site (Turner Appendix 44b). As indicated, Plaintiff had been in that storage area before the day of the accident (Turner Appendix 33b; 37b).

Plaintiff again ignores the general rule that a general contractor or construction manager is ordinarily not liable for a sub-contractor's negligence (see *Ormsby, supra*). Further, none of the exceptions to that general rule apply in this case. Turner did not retain control over the work of Conti (see *Ormsby, supra* at 173-187). Having general oversight and safety standards alone is insufficient to constitute retained control (*Ormsby, supra,* at 186-187).

The second exception would be where the work is "inherently dangerous." *Ormsby, supra,* at 175. As indicated by the Court of Appeals, there is absolutely no indication of an inherently dangerous activity, as necessary for this exception to apply.

Finally, this factual situation does not invoke the "common work area doctrine" as set forth previously in this brief.

Plaintiff again cites OSHA and MIOSHA, repeating arguments previously made in his brief. Defendant would refer the Court to Defendant's Response to Plaintiff's prior arguments.

Plaintiff again cites deposition testimony of Zoltan Lukacs and Duncan Wilson. As indicated previously, Mr. Wilson stated they might hire laborers to clean up an area after a contractor was finished with their work and that contractor had failed to clean up an area (Turner

Appendix 55b). That is not the factual situation we have here. There is nothing that needed to be "cleaned up."

Plaintiff argues that the Court of Appeals in this case did not address Plaintiff's argument regarding breach of contract. In fact, the Court of Appeals did address that by finding that Turner had no duty to store the pipes in a different manner. As further indicated by the Court of Appeals, Plaintiff's allegations against Turner were not based on premises liability, but were instead based on general contractor liability. As seen above, Plaintiff has not shown any facts that allow Plaintiff to avoid the laws which bar Plaintiff's claims against Turner.

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VII. THE TRIAL COURT AND THE COURT OF APPEALS WERE CORRECT IN FINDING THAT THERE WAS NO QUESTION OF FACT THAT THE PIPES PLAINTIFF STEPPED ON WERE OPEN AND OBVIOUS.

The pipes that Plaintiff stepped on were stored in a storage area right next to materials stored there for his employer, Conti Electric (Plaintiff Appendix 5a). Plaintiff had been in that storage area many times before (Turner Appendix 33b). Plaintiff was responsible for having lighting installed in that storage area (Turner Appendix 37b). Plaintiff admits that he was not looking where he was walking and that if he had looked he would have seen the pipes (Turner Appendix 20b; 40b; 42b). Plaintiff came around a corner of an archway and had *time* to stop and look. He did not stop and look (Turner Appendix 21b; 35b; 44-45b). Plaintiff had *room* to stop and look. He did not stop and look.

Plaintiff again argues that this was a walkway. As indicated above, it had been barricaded previously, but the barricade was taken down either the morning of the accident or the afternoon before so that the area could be opened up for installation of a stairway (Turner Appendix 37b; 13b; 58b). The small pieces of plywood seen in the photograph (Plaintiff's Appendix 5a) covered holes in the floor where the stairway was going to be anchored. It was never intended to be a walkway as argued by Plaintiff, (Turner Appendix 56b) as a stairway was going to be installed there. Further, Plaintiff admits no one told him it was a walkway (Turner Appendix 38b) and that the walkways that were previously designated were still available to him (Turner Appendix 13b; 38b).

Plaintiff again refers to MIOSHA and OSHA. Defendant would again merely state that those regulations do not apply to this factual situation and, in any event, those regulations do not give rise to a cause of action by Plaintiff.

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Plaintiff again refers to the affidavit of Christopher Mamp. As stated above, the affidavit of Christopher Mamp is pure speculation with regards to what Ghaffari saw or could have seen. Mamp is not an expert. As correctly ruled by the trial court, she could not rely on that affidavit (Hoyt Appendix 348b-350b).

Plaintiff again refers to the affidavit of Robert Pachella. This was a witness who was added by way of an Amended Witness List long after discovery was over, after mediation occurred and after Defendants had filed their Motion for Summary Disposition. In any event, the trial court did consider the affidavit of Pachella. Although the court indicated that she might accept the opinion of Pachella, she did not agree with it and correctly noted Plaintiff merely needed to be more careful (Hoyt Appendix 376b).

Finally, Plaintiff again refers to the accident/investigation report (Plaintiff's Appendix 103a) and Defendant would again point out that this report was not an exhibit and not referred to or relied on at the time of the summary disposition hearing in this matter. In any event, the report did not come to the conclusions alleged by Plaintiff. The report was filled out mainly by Plaintiff and his supervisor, Chris Mamp, and not by Turner (Turner Appendix 12b; 49b; 52b). Matthew Ressler, a recent college graduate who had only been working for Turner for three months (Turner Appendix 48b). Mr. Ressler testified that it was his belief that "no one would want to be injured" when he was filling out that report (Turner Appendix 50b). Further, the report would refer to and contained subsequent remedial measures which also would not be admissible. *Ellsworth, supra.*

Plaintiff cites unpublished cases which have no finding or precedential effect on this case. The case of *Wolfram v Hillcrest Memorial Gardens Association*, Court of Appeals No. 204746 (2002) does not assist Plaintiff because of the different factual situation involved therein.

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Wolfram was a business invitee, whereas Plaintiff in the instant case was not. In *Wolfram*, it was alleged that the color of a step was indistinguishable from the color of the floor below it. Thus, there was a question as to whether or not the condition was even open and obvious. Further, there was a question as to whether or not there was any "special aspect" to the step. There is no claim here that the color of the pipes was indistinguishable from the color of the floor. There is no question here as to whether or not there is any "special aspect" and Plaintiff has not alleged same or attempted to prove same.

Plaintiff also cites the unpublished case of *Dunkle v Kmart Corp*, Court of Appeals No. 218789 (2001). The *Dunkle* case has a different factual situation. Dunkle was a business invitee on commercial premises. The Court found that Kmart, as possessor of the premises, had a duty of care to insure that the premises were safe in general. The Court examined *Lugo* and recited the general rule that a premises possessor is not required to protect an invitee from open and obvious dangers unless there are special aspects.

In the instant case, Plaintiff alleges at p. 5 of his brief that Turner did not possess the premises. Plaintiff's Second Amended Complaint alleges failure to maintain the premises, i.e., possessed them (Hoyt Appendix 12b, paragraph 7). In any event, there is no question that the condition was open and obvious. Plaintiff had been in that area before. Plaintiff's own material was stored in that area. This can be seen in the photos supplied by Plaintiff (Plaintiff Appendix 5a). Further, there were no special aspects and Plaintiff does not argue or show any special aspects. Thus, besides the fact that these cases are unpublished, they do not assist Plaintiff due to their differing factual situations.

The trial court and the Court of Appeals properly concluded that there were no factual issues that the pipes that Plaintiff stepped on were open and obvious.

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VIII. DEFENDANT-APPELLEE TURNER DECLINES TO ADDRESS THIS ARGUMENT AS IT DOES NOT PERTAIN TO TURNER.

IX. THE COURT OF APPEALS WAS CORRECT IN UPHOLDING THE TRIAL COURT WHICH FOUND THAT DEFENDANTS WERE ENTITLED TO MEDIATION (CASE EVALUATION) SANCTIONS.

Case Evaluation in this matter was held on June 25, 2001. The panel rendered an evaluation that was unanimous. The date by which the parties had to advise the court of their decision regarding case evaluation was July 23, 2001. Plaintiff rejected the award exposing him to the possibility of being liable for costs.

Defendant Turner had previously been in the process of preparing a motion for summary disposition, which motion is dated June 26, 2001. (Hoyt Appendix 14b-29b). Prior to that, the attorney for Turner had advised Plaintiff's attorney that such a motion would be filed. Plaintiff's attorney forwarded a letter advising of some available dates (Turner Appendix 64b). Plaintiff's attorney then advised defense counsel that he was not available for hearing, except for July 31 and September 4 (Turner Appendix 65b). The next available agreeable date for all parties was September 4, 2001 and the motion was scheduled for that date and later rescheduled again.

Plaintiff attempts to argue that the *Lugo* decision would somehow have affected his decision with regards to the acceptance/rejection of case evaluation and provides a defense against awarding sanctions against Plaintiff. *Lugo* did not change the law. *Lugo* merely codified and summarized the law as it previously existed. Many of the cases and the Restatement cited by Defendants in their motion for summary disposition referred to cases subsequently referred to in *Lugo*. (For example, see *Bertrand v Alan Ford, Inc.*, 449 Mich 606; 537 NW2d 185 (1995); *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992); *Singerman v*

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Municipal Service Bureau, Inc, 455 Mich 135; 565 NW2d 385 (1997) and *2 Restatement Torts*, 2d §343 and §343A).

As indicated above, Defendant Turner was initially going to have its Motion for Summary Disposition heard on July 10, 2001. The attorney for Turner even asked Plaintiff's attorney whether or not he wanted to extend the date to accept/reject mediation, and filed a motion with the court to do so. Plaintiff refused and opposed the motion (Turner Appendix 66b). It was only at Plaintiff's request that the motion was not heard until after the acceptance/rejection date for case evaluation. Plaintiff has no reason to complain now.

MCR 2.403(O) clearly provides that a party rejecting case evaluation "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than case evaluation." Obviously, in this case, Plaintiff is liable for payment of actual costs, since he rejected case evaluation and since Summary Disposition was subsequently granted in favor of the Defendants. A "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of case evaluation." MCR 2.403(D)(2)(c). Plaintiff has set forth no facts or law which would show that case evaluation sanctions should not have been awarded.

Plaintiff has set forth no facts or law which shows that the trial court abused its discretion in awarding costs and attorney fees. The trial court's decision constitutes abuse of discretion only if that decision was grossly violative of fact and logic. *Michigan Basic Property Ins Assoc v Hackert Furniture Distributing Co Inc*, 194 Mich App 230, 234; 486 NW2d 68 (1982).

Plaintiff cites no law or facts in support of his argument that the sanctions should be reversed "in the interest of justice." Despite Plaintiff's argument to the contrary, case law has *defined* "interest of justice." See *Luidens v 63rd District Court*, 219 Mich App 24; 555 NW2d 709 (1996). That court urges caution should be used when applying the interest of justice

exception, citing provisions of "exceptional nature," and it should be applied only in "unusual circumstances." The court further warned that the exception be used in extremely limited circumstances, in order that the exception not consume the general rule and policy behind the award of sanctions. See also, *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995).

Plaintiff also challenges the hourly rate awarded by the trial court. Clearly, the hourly rate is left up to the discretion of the court. (MCR 2.403(O)(6)(b).) The court is to determine a reasonable hourly rate for services necessitated by the rejection of case evaluation. The court is to look at such factors as the (1) professional standing and experience of the attorney, (2) the skill, time and labor involved, (3) the amount in question and the results received, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship with the client. See *Wood v DAIIE*, 401 Mich 573, 588; 31 NW2d 653 (1982). Plaintiff argued that the court should use the actual hourly rate. This was rejected in *Cleary v The Turning Point*, 203 Mich App 208, 211-212; 512 NW2d 9 (1994). Thus, Plaintiff's claim that the hourly rate must be limited to the rate actually paid is incorrect and proper. The trial court determines a reasonable hourly rate.

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RELIEF REQUESTED

Defendant-Appellee, Turner Construction Company, respectfully requests that this Honorable Court affirm the rulings of the trial court and the Court of Appeals and award costs and attorney fees so wrongfully sustained.

Respectfully submitted,

MOFFETT & DILLON, P.C.

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Dated: January 25, 2005

PROOF OF SERVICE

Mary J. Kavanagh, deposes and states that on the 25th day of January, 2005, she caused to be served upon the attorneys of record in this matter and the Clerk of the Michigan Supreme Court copies of Defendant-Appellee, Turner Construction Company's Brief on Appeal and this Proof of Service, by placing a copy of the same in envelopes, clearly and correctly addressed as follows and depositing said envelopes, with postage prepaid thereon in a receptacle for the United States mail located in the City of Birmingham, Michigan:

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MARY J. KAVANAGH